



Entered on Docket  
September 27, 2007

A handwritten signature in black ink, appearing to read "R. B. Riegle".

Hon. Linda B. Riegle  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE COMPANY,  
Debtor.

Case Nos.:

BK-S-06-10725-LBR  
BK-S-06-10726-LBR  
BK-S-06-10727-LBR  
BK-S-06-10728-LBR  
BK-S-06-10729-LBR

In re:

USA CAPITAL REALTY ADVISORS, LLC,  
Debtor.

JOINTLY ADMINISTERED  
Chapter 11 Cases

In re:

USA CAPITAL DIVERSIFIED TRUST DEED FUND,  
LLC,

Judge Linda B. Riegle

Debtor.

In re:

USA CAPITAL FIRST TRUST DEED FUND, LLC,  
Debtor.

AMENDED STIPULATED  
PROTECTIVE ORDER

In re:

USA SECURITIES, LLC,  
Debtor.

Affects:

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

1        This Amended Stipulated Protective Order (the “Amended Protective Order”) is made  
 2 upon the stipulation of counsel for the USACM Liquidating Trust, Post-Effective Date USA  
 3 Capital Diversified Trust Deed Fund, USA Investment Partners, LLC, Ford Elsaesser as  
 4 interim chapter 11 trustee for Joseph D. Milanowski, and Michael Carmel as chapter 11  
 5 trustee for Thomas A. Hantges (collectively, the “Parties”).  
 6

7        WHEREAS, on April 13, 2006, USA Commercial Mortgage Company (“USCM”),  
 8 USA Capital Realty Advisors, LLC, USA Capital Diversified Trust Deed Fund, LLC, USA  
 9 Capital First Trust Deed Fund, LLC, and USA Securities, LLC (collectively, the “Debtors”)  
 10 filed voluntary petitions for reorganization under chapter 11 of title 11 of the United States  
 11 Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of  
 12 Nevada, (the “Bankruptcy Court”), Case No. BK-S-06-10725-LBR (the “USACM Chapter 11  
 13 Cases”);  
 14

15        WHEREAS, on January 8, 2007, the Bankruptcy Court entered an order confirming  
 16 the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization (the “USACM Plan”);  
 17

18        WHEREAS, on January 31, 2007, the Court entered an order (the “Stipulated  
 19 Protective Order”) [Docket No. 2624] approving a stipulation between counsel for the  
 20 Debtors, the Official Committee of Unsecured Creditors for USA Commercial Mortgage  
 21 Company, the Official Committee of Equity Security Holders of USA Capital Diversified  
 22 Trust Deed Fund, LLC, acting on their own behalf and on behalf of the Post-Effective Date  
 23 Entities for their estates and the USACM Trust Committee and DTDF Post-Effective Date  
 24 Committee, respectively<sup>1</sup>; USA Investment Partners, LLC (“USAIP”), and Joseph D.  
 25  
 26

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<sup>1</sup> Unless otherwise defined, capitalized terms used herein shall be given the meaning ascribed to such terms pursuant to the Plan.

1 Milanowski (“Milanowski”) acting on his own behalf and all other non-Debtor insiders  
2 including, but not limited to, Thomas A. Hantges (“Hantges”);

3 WHEREAS, pursuant to the Plan, on March 12, 2007, the USACM Liquidating Trust  
4 (the “USACM Trust”) succeeded to certain assets, claims, and other rights previously held by  
5 USACM;

6 WHEREAS, pursuant to the Plan, on March 12, 2007, Post-Effective Date USA  
7 Capital Diversified Trust Deed Fund, LLC (“Diversified”) was revested with certain assets,  
8 claims, and other rights previously held by Pre-Effective Date USA Capital Diversified Trust  
9 Deed Fund, LLC;

10 WHEREAS, on April 4, 2007, USAIP was placed into an involuntary chapter 11 case  
11 in the Bankruptcy Court, Case No. BK-S-07-11821-LBR (the “USAIP Chapter 11 Case”);

12 WHEREAS, on April 6, 2007, the Bankruptcy Court entered an order confirming the  
13 appointment of Lisa Poulin as interim chapter 11 trustee for the USAIP chapter 11 estate (the  
14 “USAIP Trustee”);

15 WHEREAS, on May 9, 2007, the Bankruptcy Court entered an order for relief in the  
16 USAIP Chapter 11 Case;

17 WHEREAS, on or about May 29, 2007, Milanowski was placed into an involuntary  
18 chapter 11 case in the Bankruptcy Court, Case No. BK-S-07-13162-LBR (the “Milanowski  
19 Chapter 11 Case”);

20 WHEREAS, on or about May 29, 2007, Hantges was placed into an involuntary  
21 chapter 11 case in the Bankruptcy Court, Case No. BK-S-07-13163-LBR (the “Hantges  
22 Chapter 11 Case”);

23 WHEREAS, on June 8, 2007, the Bankruptcy Court entered an order directing the  
24 U.S. Trustee to appoint an interim chapter 11 trustee in the Milanowski Chapter 11 Case;

1        WHEREAS, on June 8, 2007, the U.S. Trustee appointed Ford Elsaesser as interim  
2 trustee in the Milanowski Chapter 11 Case (the “Milanowski Trustee”);

3        WHEREAS, on June 8, 2007, the Bankruptcy Court entered an order directing the  
4 U.S. Trustee to appoint an interim chapter 11 trustee in the Hantges Chapter 11 Case;

5        WHEREAS, on June 8, 2007, the U.S. Trustee appointed Michael W. Carmel as  
6 interim trustee in the Hantges Chapter 11 Case (the “Hantges Trustee”);

7        WHEREAS, on June 22, 2007, the Bankruptcy Court entered an order for relief in the  
8 Hantges Chapter 11 Case, and the Hantges Trustee continues to serve as the trustee in the  
9 Hantges Chapter 11 Case.

10       WHEREAS, on August 13, 2007, the Bankruptcy Court entered an order for relief in  
11 the Milanowski Chapter 11 Case, and the Milanowski Trustee continues to serve as the trustee  
12 in the Milanowski Chapter 11 Case.

13       WHEREAS, paragraph 27 of the Stipulated Protective Order states that it may be  
14 amended as necessary or appropriate, and paragraph 28 of the Stipulated Protective Order  
15 states that it will be binding upon the successors of each of the parties thereto, including the  
16 Debtors’ successors as provided in the Plan, and further provides that each such successor  
17 shall have all of the rights and obligations of a party to the Stipulated Protective Order;

18       WHEREAS, from March 21, 2007 through March 23, 2007, the parties to the  
19 Stipulated Protective Order conducted an initial review of hard copy documents subject to  
20 that order, and the documents initially designated by the IP Parties (as defined in the  
21 Stipulated Protective Order) as “privileged” or “confidential” during that review were  
22 segregated from the remaining documents for deliberation by the taint team and are currently  
23 maintained in six boxes pursuant to the Stipulated Protective Order (collectively, the “Taint  
24 Boxes”), with taint team members having compact discs prepared by a third party vendor that

1 scanned, imaged, and labeled with a bates number every document contained in the Taint  
2 Boxes (collectively, the "Imaged Taint Documents");  
3

4 WHEREAS, for various reasons, the parties to the Stipulated Protective Order have  
5 been unable to complete the review and production of the electronic documents, including e-  
6 mails, that are subject to the terms of the Stipulated Protective Order;  
7

8 WHEREAS, as successors-in-interest to the parties to the Stipulated Protective Order,  
9 the Parties have jointly and individually concluded that the procedures set forth in the  
10 Stipulated Protective Order concerning the review and production of Documents (as such  
term is defined in the Stipulated Protective Order) should be replaced by the procedures set  
11 forth in this Amended Protective Order, thereby providing shared access to Documents and  
12 other writings within the scope of the Stipulated Protective Order, and providing the  
13 individual debtors Hantges and Milanowski with a procedure to individually assert privileges  
14 with respect to such Documents and writings;  
15

16 NOW THEREFORE, based upon the foregoing recitals, the Parties and their  
17 respective counsel agree to amend and replace paragraphs 3, 4, 5, 6, 7, 10, 11, 24, 25, and 30  
18 of the Stipulated Protective Order as follows:  
19

20 PRIVILEGE REVIEW OF TAINT BOXES

21 1. The USACM Trust's taint team member shall provide copies of the compact  
22 discs containing the Imaged Taint Documents to Hantges and Milanowski (collectively, the  
23 "Insiders") through their counsel.  
24

25 2. On or before the expiration of ten (10) days following delivery of the discs  
26 containing the Imaged Taint Documents to the Insiders as required by paragraph 1 hereof (the  
"Taint Documents Privilege Log Deadline"), an Insider claiming a privilege with respect to  
any Imaged Taint Document shall deliver to each Party a log setting forth the following  
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1 information with respect to each such document as to which a privilege is asserted (a “Taint  
2 Documents Privilege Log”): (a) the bates number(s) of the document; (b) the type of  
3 document; (c) general subject-matter of the document; (d) the date of the document; (e) the  
4 letterhead, if any, on the document; (f) the name of the person or entity asserting the  
5 privilege; (g) the name of any person or entity that jointly holds the privilege; (h) the name  
6 and title of the author(s) of the document; (i) the name and title of the addressee(s) of the  
7 document, the carbon copy and blind copy recipient(s) indicated on the document, and any  
8 recipients identified in the text of the document; and (j) the nature of the privilege(s) being  
9 asserted. If any person whatsoever other than Milanowski, Hantges, or counsel was an  
10 intended or actual recipient of the document, the Insiders may not claim that document as  
11 privileged unless they also acknowledge that it is subject to a joint privilege held by one of  
12 the Parties and, therefore, accessible immediately to the holder of that joint privilege pursuant  
13 to paragraph 6 hereof.

16       3.      The Insiders shall not make any copies of such discs or of the Imaged Taint  
17 Documents contained therein in any form whatsoever. On or before the Taint Documents  
18 Privilege Log Deadline, the Insiders shall return the discs to the IP Parties’ taint team  
19 participant along with the IP Parties’ copy of the discs. Acceptance by the Insiders of the  
20 Imaged Taint Documents shall bind the Insiders to this obligation.

22       4.      All taint team members shall destroy all copies of any Imaged Taint  
23 Documents and any discs containing any Imaged Taint Documents within ten (10) days after  
24 the Taint Documents Privilege Log Deadline.

25 ACCESS TO TAINT DOCUMENTS

26       5.      Upon receipt of a Taint Documents Privilege Log complying with paragraph 2  
hereof, the USACM Trust shall direct the third party vendor that scanned, imaged, and

labeled the Imaged Taint Documents to (1) segregate all Imaged Taint Documents identified on the Taint Documents Privilege Log(s) (the "Allegedly Privileged Taint Documents") from the remaining Imaged Taint Documents, and (2) provide the Parties with discs containing Imaged Taint Documents in accordance with the following:

- (a) If and only if Hantges submits a Taint Documents Privilege Log in accordance with the foregoing provisions, then Hantges shall receive discs containing (i) all Imaged Taint Documents identified on that Taint Documents Privilege Log, and (ii) all other Imaged Taint Documents not identified on any Taint Documents Privilege Log submitted by Milanowski.
- (b) If and only if Milanowski submits a Taint Documents Privilege Log in accordance with the foregoing provisions, then Milanowski shall receive discs containing (i) all Imaged Taint Documents identified on that Taint Documents Privilege Log, and (ii) all other Imaged Taint Documents not identified on any Taint Documents Privilege Log submitted by Hantges.
- (c) The Parties shall receive discs containing all Imaged Taint Documents, except the Allegedly Privileged Taint Documents.

6. Commencing on the day following the Taint Documents Privilege Log Deadline, the Parties shall be allowed to access, review, print, or copy all Imaged Taint Documents with the exception of the Allegedly Privileged Taint Documents. The Parties shall not be allowed to access, review, print, or copy the Allegedly Privileged Taint Documents, except pursuant to the provisions of paragraph 22 hereof. Nothing in this paragraph shall preclude any of the Parties from accessing, reviewing, printing, or copying

1 any Allegedly Privileged Taint Documents to the extent that: (a) such documents are  
 2 described as being subject to a joint privilege in the Taint Documents Privilege Log; and (b)  
 3 one of the Parties controls or holds the alleged joint privilege as to such documents.  
 4

5       7. If the Insiders fail to provide a Taint Documents Privilege Log on or before the  
 6 Taint Documents Privilege Log Deadline, any and all privileges held by the Insiders shall be  
 7 waived as to the Imaged Taint Documents.

8 **IMAGING OF ELECTRONIC DOCUMENTS**

9       8. The USACM Trust shall hire and direct forensic computer technicians  
 10 (collectively, the “Computer Technicians”) to identify and image certain electronic  
 11 documents from each of the Debtors’ electronic data sources that existed as of the petition  
 12 date in the USACM Chapter 11 Cases, including, but not limited to, (a) all e-mails and other  
 13 documents extracted from Hantges’ and Milanowski’s files and folders on the USACM  
 14 Exchange Servers and the hard drives of the computers used by Hantges and Milanowski  
 15 during their employment by the Debtors or their affiliates (collectively, the “Extracted  
 16 Documents”); and (b) certain e-mails and other documents extracted from other USACM  
 17 employees’ files and folders on the USACM Exchange Servers and the hard drives of the  
 18 computers used by other USACM employees (collectively, the “Third Party Extracted  
 19 Documents”). The USACM Trust shall be under no obligation to image the entire universe of  
 20 USACM’s electronic documents.

21       9. The fees and expenses incurred by the Computer Technicians in connection  
 22 with the above-referenced project shall be shared equally (or as otherwise agreed) among the  
 23 Parties.

24       10. The identification and imaging of Extracted Documents pursuant to the terms  
 25 of this Amended Protective Order shall not cause, and shall not give a right to anyone to  
 26

1 claim, a waiver of any privilege with respect to such Extracted Documents, except to the  
2 extent that the terms of this Amended Protective Order provide otherwise. It is the express  
3 intention of the Parties to preserve and protect any and all privileges that may be applicable to  
4 the Extracted Documents pursuant to the terms of this Amended Protective Order.  
5

6 PRIVILEGE REVIEW OF EXTRACTED DOCUMENTS

7 11. Within ten (10) days following entry of this Amended Protective Order (the  
8 "Search Term Deadline"), the Insiders must notify the USACM Trust of each and every  
9 Search Term (as defined below) they desire to be used to locate Extracted Documents as to  
10 which the Insiders contend they may hold a privilege (collectively, the "Potentially Privileged  
11 Extracted Documents"), together with their agreement to promptly pay for their share of the  
12 cost of such search as provided below. The Insiders may request that such search be  
13 narrowed (at additional cost to the Insiders), not expanded, but any such request shall not  
14 extend the Extracted Documents Privilege Log Deadline (as defined below). If the Insiders  
15 fail to provide the Search Terms or their agreement to pay for the costs of the search on or  
16 before the Search Term Deadline, any and all privileges held by the Insiders shall be waived  
17 as to the Extracted Documents.

18 12. In the event the USACM Trust receives a written notice of Search Terms from  
19 one or both of the Insiders with an agreement to pay for their share of the cost of the Search  
20 Term procedures in paragraphs 12-15 hereof (a "Search Term Notice") on or before the  
21 Search Term Deadline, the USACM Trust shall direct the Computer Technicians: (a) to  
22 employ such Search Terms to search those Extracted Documents that are identified and  
23 imaged (i) as of the Extracted Documents Review Date (as defined below), or (ii) after the  
24 date such Search Term Notice is actually received by the USACM Trust, whichever is later,  
25 to locate Potentially Privileged Extracted Documents; and (b) to deliver a copy of all so-

1 identified Potentially Privileged Extracted Documents directly to Hantges or Milanowski,  
2 according to the Search Terms provided by each such Insider.

3       13. The fees and expenses incurred by the Computer Technicians in connection  
4 with the above-referenced project shall be paid as follows: (a) the initial \$10,000.00 of such  
5 fees and/or expenses shall be shared equally (or as otherwise agreed) among the Parties; and  
6 (b) any fees and/or expenses beyond the initial \$10,000.00 shall be shared equally on a 50-50  
7 basis between the Insider providing the Search Terms, on the one hand, and the Parties as a  
8 collective group (or as otherwise agreed among the Parties), on the other hand.

9       14. For the purposes of this Amended Protective Order, the term "Search Terms"  
10 shall mean and refer to all keywords that an Insider desires the Computer Technicians to  
11 employ in running queries on the Extracted Documents in a good faith effort to identify  
12 Potentially Privileged Extracted Documents, provided, however, that Search Terms shall  
13 include: (a) names of lawyers and law firms identified by the Insiders; and (b) additional  
14 search terms identified by the Insiders that are reasonably calculated to capture potentially  
15 privileged communications.

16       15. On or before the expiration of ten (10) days following receipt by an Insider of  
17 Potentially Privileged Extracted Documents pursuant to paragraph 12 hereof (the "Extracted  
18 Documents Privilege Log Deadline"), such Insider shall deliver to each Party hereto a log  
19 setting forth the following information with respect to each Potentially Privileged Extracted  
20 Document as to which such Insider asserts a privilege: (a) type of document; (b) general  
21 subject-matter of the document; (c) the date of the document; (d) the letterhead, if any, on  
22 which the document is printed; (e) the name of the person or entity asserting the privilege; (f)  
23 the name of any person or entity that jointly holds the privilege; (g) the name and title of the  
24 author(s) of the document; (h) the name and title of the addressee(s) of the document, the

1 carbon copy and blind copy recipient(s) indicated on the document, and any recipients  
2 identified in the text of the document; and (i) the nature of the privilege(s) being asserted (a  
3 “Extracted Documents Privilege Log”). If any person whatsoever other than Milanowski,  
4 Hantges, or counsel was an intended or actual recipient of the document, the Insiders may not  
5 claim that document as privileged unless they also acknowledge that it is subject to a joint  
6 privilege held by one of the Parties and, therefore, accessible immediately to the holder of that  
7 joint privilege pursuant to paragraph 16 hereof. Upon receipt of an Extracted Documents  
8 Privilege Log complying with this provision, the USACM Trust shall direct the Computer  
9 Technicians to segregate all Potentially Privileged Extracted Documents identified on such  
10 Extracted Documents Privilege Log (collectively, the “Allegedly Privileged Extracted  
11 Documents”).

#### ACCESS TO EXTRACTED DOCUMENTS

16. Commencing on the date that is ten (10) days following entry of this Amended  
17 Protective Order by the Bankruptcy Court (the “Extracted Documents Review Date”), the  
18 Parties shall be allowed to access, review, print, or copy all Extracted Documents that are not  
19 identified as Potentially Privileged Extracted Documents pursuant to the provisions of this  
20 Amended Protective Order. Commencing upon expiration of the Extracted Documents  
21 Privilege Log Deadline, the Parties shall be allowed to access, review, print, or copy all  
22 Potentially Privileged Extracted Documents that are not designated as Allegedly Privileged  
23 Extracted Documents pursuant to paragraph 15 hereof. The Parties shall not be allowed to  
24 access, review, print, or copy Allegedly Privileged Extracted Documents, except pursuant to  
25 the provisions of paragraph 22 hereof. Nothing in this paragraph shall preclude any of the  
26 Parties from accessing, reviewing, printing, or copying any Allegedly Privileged Extracted  
Documents to the extent that: (a) such documents are described as being subject to a joint

1 privilege in the Extracted Documents Privilege Log; and (b) one of the Parties controls or  
2 holds the alleged joint privilege as to such documents.

3       17. If the Insiders fail to provide an Extracted Documents Privilege Log on or  
4 before the Extracted Documents Privilege Log Deadline, any and all privileges held by the  
5 Insiders shall be waived as to the Potentially Privileged Extracted Documents.  
6

7 **ACCESS TO THIRD PARTY EXTRACTED DOCUMENTS**

8       18. At any time following the entry of this Amended Protective Order, the Parties  
9 shall be allowed to access, review, print, and/or copy all Third Party Extracted Documents in  
10 accordance with the provisions of this Amended Protective Order.

11 **MISCELLANEOUS PROVISIONS**

12       19. This Amended Protective Order is entered into in accordance with Federal  
13 Rules of Bankruptcy Procedure 7026 and 9018 in order to provide for the protection of  
14 privileged and confidential information.

16       20. Any notice, request, demand, instruction, or other communication to be given  
17 pursuant to this Amended Protective Order shall be in writing and may be delivered either by  
18 facsimile transmission, hand delivery, or United States First Class certified mail, return  
19 receipt requested, to the Parties and persons listed below. If notice is mailed pursuant to the  
20 terms of this provision, such notice shall be deemed to have been delivered, whether actually  
21 received or not, upon deposit in a regularly maintained official depository of the United States  
22 Postal Service located in the continental United States:  
23

24  
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1  
2       Counsel to the Hantges Trustee  
3

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17      (702) 384-7057 (Facsimile)

18           21. The terms and conditions of the Stipulated Protective Order shall remain in  
19           place and force following entry of this Amended Protective Order by the Bankruptcy Court,  
20           provided, however, that paragraphs 3, 4, 5, 6, 7, 10, 11, 24, 25, and 30 of the Stipulated  
21           Protective Order are expunged and replaced by the terms of this Amended Protective Order.

22           22. Except as provided otherwise under the terms of this Amended Protective  
23           Order, nothing contained herein shall be deemed to be a determination of the existence or  
24           waiver of any privilege with respect to the Documents or other writings addressed in this  
25           Amended Protective Order including, but not limited to, the Extracted Documents and the  
26           Taint Documents. Any Party hereto may challenge the propriety of the designation of any  
Extracted Document as an Allegedly Privileged Extracted Document, or Taint Document as  
an Allegedly Privileged Taint Document, by filing an application with the Bankruptcy Court  
seeking an *in camera* review of such challenged documents. The Insider asserting a privilege  
with respect to such challenged documents shall then have ten (10) days to either remove the  
designation or to oppose the application, which opposition shall include providing a legible  
copy of such challenged documents to the Bankruptcy Court for its use in conducting the *in*

1 *camera* review. Nothing herein precludes the Bankruptcy Court from appointing a special  
2 master to conduct the *in camera* review. Agreement by the Parties to the terms of this  
3 Amended Protective Order does not preclude the Bankruptcy Court from imposing sanctions  
4 on Insiders if the Court determines that privilege assertions have not been made in good faith.  
5

6       23. Nothing contained herein is intended to waive or otherwise impair the ability  
7 of the Hantges Trustee or Milanowski Trustee to assert or control any privileges held by the  
8 Insiders prior to the commencement of the Hantges Chapter 11 Case and/or the Milanowski  
9 Chapter 11 Case.

10      24. This Amended Protective Order may be amended or supplemented from time  
11 to time as is necessary or appropriate.  
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1 STIPULATED and AGREED to this 19<sup>th</sup> day of September 2007.

2  
3 **DIAMOND MCCARTHY LLP**

4 /s/ Eric D. Madden

Eric D. Madden

5 *Special Litigation Counsel for the*  
*USACM Liquidating Trust*

6  
7 **LEWIS AND ROCA, LLP**

8 /s/ Rob Charles

Rob Charles

9 *Counsel for the*  
*USACM Liquidating Trust*

10  
11 **ORRICK, HERRINGTON &**  
**SUTCLIFFE LLP**

12 /s/ Marc A. Levinson

Marc A. Levinson

13 *Counsel for Post-Effective Date*  
*USA Capital Diversified Trust Deed*  
*Fund, LLC*

16 **GORDON & SILVER LTD.**

17 /s/ Greg E. Garman

Greg E. Garman

18 *Counsel for Lisa M. Poulin,*  
*Chapter 11 Trustee for USA Investment*  
*Partners, LLC*

20  
21                  ### END OF ORDER ###

22 Prepared and Submitted by:

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2  
3 **STEPTOE & JOHNSON, LLP**

4 /s/ Robbin Itkin

Robbin Itkin

5 *Counsel for Michael W. Carmel,*  
*Chapter 11 Trustee for*  
*Thomas A. Hantges*

6  
7 **COX SMITH MATTHEWS**  
**INCORPORATED**

8 /s/ Deborah D. Williamson

Deborah D. Williamson

9 *Counsel for Ford Elsaesser,*  
*Chapter 11 Trustee for*  
*Joseph D. Milanowski*

10  
11 **PARSONS BEHLE & LATIMER**

12 /s/ Robert L. Rosenthal

Robert L. Rosenthal

13 *Counsel to Joseph D. Milanowski*